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No. 76-635

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

UNITED STATES STEEL CORPORATION, ET AL., ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

Appellants,

vs.

MULTISTATE TAX COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE FOR THE COUNTY OF LOS ANGELES RE: CONGRESSIONAL AUTHORITY TO PROHIBIT STATE AND LOCAL TAXES AND THE APPORTIONING OF TAXES

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with an argument to the effect that the state action there was a regulation and that the import-export clause (Art. I, §10, cl. 2) prohibited one specie of state regulation thus positively affirming the uncontrollable right to impose others. Justice Marshall accepted this argument, but stated that the state action was not regulation but taxation. He said,

> "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States." (22 U.S. (9 Wheat.) 1, at p. 199, 6 L.Ed. 23 at p. 71)(emphasis added).

The Court goes on,

> "Congress is not empowered to tax for those those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and in doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce. . . .

> "The sole question is, can a state regulate commerce with foreign nations and among the states, while Congress is regulating it?
>
> "The counsel for respondent answer . . . that limitations of a power furnish a strong argument in favor of the existence of that power, and that the section which prohibits the states from laying duties on imports or exports proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation not expressly fobidden, to which the original power of the state is competent, may still be made. That this restruction shows the opinion of the convention, that a state might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence from this concession, that a state may regulate commerce, with foreign nations and among the states, cannot be admitted . . . [because] [w]e think it very clear that [the import-export clause] . . . is considered as a branch of the taxing power. . . .
>
> "This prohibition, then, is an exception from the acknowledged power of the states to levy taxes. . . ."
> (22 U.S. (9 Wheat.) 1, at pp. 199-202, 6 L.Ed. 23 at p. 71.)

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INTEREST OF THIS AMICUS CURIAE

The Amicus Curiae collects some $3 billion in property taxes which provide for the local services provided to business and personal property, including intrastate, interstate, and

foreign businesses.

The assumptions made and positions taken by the appellants will eventually lead to the possible cancellation of ANY or ALL of this revenue.

SUMMARY OF ARGUMENT

State taxation has always "burdened" interstate and foreign commerce. But it does not always regulate commerce. The framework for this case is the interpretation of Congress' power under the commerce clause. That clause has been misunderstood in that regard since 1940.

It is time to review what our founding fathers actually had in mind when conferring the regulation of commerce on Congress and the power to tax on both federal and state governments.

THE COMMERCE CLAUSE DOES NOT CONFER ON CONGRESS THE POWER TO PROHIBIT OR REGULATE STATE TAXES AS LONG AS THOSE TAXES ARE NON-REGULATORY.

The appropriate test, then, for determining the commerce clause issues in this case is whether some procedural aspect of the states' action is regulatory. If, and only if, that action is regulatory, then the usual analysis of the effect of Congressional pre-emption of the field and the necessity for uniform regulations can be applied. But Congress cannot pre-empt non-regulatory state taxation.

The foundation for these views is the historical analysis of the commerce clause and other provisions detailed in Clark, Property Taxation of Foreign Goods and Enterprise -- A Study in Inconsistency, 4 Pepperdine Law Review 39 (1976).

The appellants' argument concerning the apportioning of taxes in accordance with the business activities of the taxpayer in the taxing jurisdiction do not reflect on the commission itself, but call into question the whole federal-state relationship. It is clear that apportionment of taxes is not a new concept. It is also apparent that the appellants' arguments to the effect that states must never have any effect on international affairs is contrary to the states' very existence.

The states can maintain both logically and under the constitution, a state tax system which will gather revenue without regulating interstate or foreign commerce.

I
INTRODUCTION

The appellant has suggested that by the act of taxing, the states have regulated commerce. It is important to understand, however, that regulation and taxation are not the same thing. As Chief Justice Marshall said in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824),

> "But when a state proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

Somehow during the last 150 years courts began to view taxation in the same way as regulation, and at one time it was in vogue to test the propriety of state taxes under the commerce clause on the basis of whether they "substantially burdened" interstate commerce.

Of course, whether a substantial burden was imposed or an insubstantial one, depended in large part on the "gut reaction" of the justice reviewing the tax. Such tests do no good for either the taxing authority or the taxpayer.

Perhaps the most detailed set of criteria supplied by the Court under the commerce clause was set forth in its recent opinion in Complete Auto Transit v. Brady, ___ U.S. ___, 51 L.Ed. 2d 326, 97 S.Ct. 1076 (1977).

This same criteria is appropriate to determine when a tax becomes regulatory.

Thus, the appellants' reliance on the Commerce Clause is misplaced in that Congress does not have the authority the appellants contend the Commission is taking.

II
CONGRESS DOES NOT HAVE THE AUTHORITY TO PROHIBIT OR REGULATE STATE NON-REGULATORY TAXATION

"I am willing here to allow, in its full extent, the justness of the reasoning, which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports), they would, under the plan of the Convention [i.e., the Constitution], retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the National Government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution."

This Amicus Curiae is of the opinion that this statement from the Federalist Papers (#32 by Alexander Hamilton) is as true today as it was in 1789. It has been falsely assumed that the power of Congress to prohibit state taxes exists. But when one closely researches the cases relied upon for this assumption, it can be seen that they all deal with Congressional power to prohibit state regulation of commerce.

The two powers are distinct, although it is clear that taxation may become regulatory.

The dicta of late nineteenth century cases and its effect on the thinking of the courts is detailed in Clark, supra, 4 Pepperdine Law Review 39.

It should be emphasized that when taxes become regulatory, discriminating for or against interstate or foreign commerce, they are then regulatable by Congress (and, indeed possibly outright void as either encroaching on an area already pre-empted by Congress or on an area where national uniformity is required, i.e., in dealing with foreign enterprises). But as this court said,

> "It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the [import-export] clause's prohibition." (Michelin Tire Corp. v. Wages, 423 U.S. 276 at p. 286.)

The statement also applies to all forms of state taxation which do not regulate commerce.

A reading of the Federalist Papers (especially nos. 32 and 33) should be enough to convince one that the Congressional authority to prohibit these "neutral" taxes simply does not exist. Justice Marshall explicitly recognized the lack of power in Gibbons v. Ogden, supra. He was confronted

So Justice Marshall fully confirms the absolute right in the states to impose taxes, which Alexander Hamilton had previously described.

Justice Taney rendered the same opinion of the states' ability to tax without control by Congress.

> "Upon examining the [Gibbons v. Ogden] opinion, it will be seen that the Court, when it uses the expressions which are supposed to coutenance the doctrine of the exclusive power in Congress, is commenting upon the argument of counsel in favor of equal power on the subject in the states and the general government, where neither party is bound to yield to the other; and is drawing the distinction between cases of concurrent powers and those in which the supreme or paramount power was granted to Congress. It therefore very justly speaks of the States as exercising their own powers in laying taxes for state purpose although the same thing is taxed by Congress; and as exercising the powers granted to Congress when they make regulations of commerce. In the first case, the state power is concurrrent with that of the general government -- is equal to it, and is not bound to yield." (The License Cases, 46 U.S. (5 How.) 504 at pp. 581-582, 12 L. Ed. 256 at p. 291.)

In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), the tax was not struck down because it was prohibited by Congress, but

because it was regulatory. In Brown v. Maryland, supra (as this court noted in Michelin Tire Co. v. Wages, 423 U.S. 276 (1976)), the Court did not invalidate the discriminatory tax because it was prohibited by Congress, but because it was laid upon imports because of their foreign origin and was therefore regulatory. Chief Justice Marshall makes several attempts to explain that when such a tax would fall upon all property uniformly, it would be appropriate, but,

> "Any penalty inflicted upon the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation." (25 U.S. (12 Wheat.) 419, at p. 448, 6 L. Ed. 678 at p. 688)(emphasis added).

So Gibbons v. Ogden, supra, and all of the other cases cited for the proposition that Congress' authority to prohibit state taxation is complete, simply do not support the theory.

III
LATE NINETEENTH CENTURY CASES DO NOT SUPPORT THE THEORY OF CONGRESSIONAL CONTROL OF STATE TAXATION

The difference between regulation and taxation was once understood (and has been again brought to light in Michelin Tire Corp. v. Wages, supra). But toward the middle of the nineteenth century the distinction between the two became

clouded. Again, this process is developed in Clark, supra.

It may be that part of the confusion in the late 19th century stems from the fact that Cooley v. Board of Port Wardens, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851) tacitly lumps state powers which are vested in Congress by the constitution and able to be performed by the states only until exercised by Congress, with taxing power. (See 53 U.S. (12 How.) 299, at pp. 318-319, 13 L.Ed. 996 at pp. 1004-1005). But a close reading of the language there does not support the conclusion that the Cooley court felt that the two should be subject to the same Congressional controls. In fact, by referring to the very Federalist Papers which maintain the absolute authority in the states, Cooley, implies the contrary. (The cases cited at 53 U.S. 319, 13 L.Ed. 1005 deal with powers presently called "concurrent," i.e., those given to Congress, but exercisable by the states until Congress acts, e.g., to regulate commerce [Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 7 L.Ed. 412 (1829)], to court martial militiamen called to national duty [Moore v. Houston, 18 U.S. (5 Wheat.) 1, 5 L.Ed. 19 (1820)], and to create bankruptcy laws [Sturges v. Crownshield, 17 U.S. (4 Wheat.) 122, 7 L.Ed. 412]).

The nature of the power of taxation is different in that,

> "The power of taxation . . . is capable of residing in, and being exercised by, different authorities at the same time." (Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 at p. 197, 6 L.Ed. 23 at p. 71.)

And,

> "[neither] is bound to yield." (The License Cases, 46 U.S. (5 How.) 504 at p. 582, 12 L.Ed. 256 at p. 291.)

The power of taxation, then, is both a dual power and totally separate from the power to regulate commerce.

> "There is no analogy, then, between the power of taxation and the power of regulating commerce." (Gibbon v. Ogden, 22 U.S. (9 Wheat.) 1 at p. 199, 6 L.Ed. 23 at p. 71.)

So, the power of Congress, now assumed to stop all state action in the area of taxation was never recognized during the period at which the Constitution was ratified and being first interpreted, and there is abundant authority for the proposition that the states' right to tax is "sacred" (Brown v. Maryland, supra, 25 U.S. (12 Wheat.) 419 at p. 448, 6 L.Ed. 678 at p. 689). Professor Crosskey in his book Politics and the Constitution in the History of the United States (Univ. of Chicago Press (1953)) sets forth one possible reason why this confusion took place. It was in the interests of the southern states to protect themselves from the totality of federal regulation which Professor Crosskey theorizes. The justices on the Supreme Court from the South were interested in that protection and developed the "territorial view" that regulation by Congress was appropriate outside the states' borders.

The theory that Congress and the states exercised "concurrent" powers to regulate interstate commerce grew when the theory was to the advantage of the states. But Justice Taney called the taxation power "equal" (The License Cases, supra, 46 U.S. (5 How.) at p. 582, 12 L.Ed. 256 at p. 291) meaning capable of being exercised at the same time.

The Cooley court, as previously pointed out, put that power in the same paragraph as powers capable of being exercised part by one party and part by another, but not the same part by the same party (i.e., incapable of being exercised by two parties at the same time).

The dicta later on toward the turn of the century was stronger yet, and the stage was set for the collapse of the territorial view as Congress asserted its authority in interstate commerce regulation. That collapse would cause the view that Congress could prohibit state taxation (see also, Clark, supra).

IV
THE TWENTIETH CENTURY -- "CENTRALIZATION"

The view that Congress' authority to regulate interstate and foreign commerce was plenary and complete, grew to mean that Congress had the authority to regulate any state or local action in any way affecting the commerce. One recent statement of this misconception was made in Board of Trustees v. United States, 289 U.S. 48 (1933). There, the Court dealt with a state university's contention that its property, imported from abroad, should not be subject to customs duties because the university was a part of the state. Of course, the simple answer to the university's contention is that the federal regulations cannot, and should not, be ignored simply because it affects property belonging to a state (see New York v. United States, 326 U.S. 572, 90 L.Ed. 326. 66 S. Ct. 310 (1946)). But the Court went further, assuming

that because revenue was derived from the tariffs, they were a tax as well as a regulation. But even following this assumption appropriately leads to the validity of the federal levy because ". . . neither is bound to yield." (The Licenses Cases, supra, 46 U.S. (5 How.) 504 at p. 582, 12 L.Ed. 256 at p. 291.) But the Court said in speaking of the commerce clause,

> "It is an essential attribute of the power that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified, or impeded to any extent by state action." (289 U.S. 48 at pp. 56-57.)

True enough when dealing with regulations of commerce by the states or a states' efforts to avoid federal regulations. But the state power to tax non-discriminatorily and without the possibility of double taxation, i.e., a neutral tax, does not impinge on that power in the least. (Of course, the tax must also not be so great as to prohibit the commerce generally. Such a tax would be contrary to the due process idea that the tax must bear a sufficient relationship to the benefits and protections conferred by the state on the taxpayer. Also see argument, supra, regarding this Court's authority to review taxes under the due process clause as excessive.)

But the Court seized upon this lanauge from Board of Trustees in rendering the opinion that a customs regulation, tacitly reviewed by Congress, could void state taxes on goods which are in certain types of customs bond. McGoldrick

v. Gulf Oil Corp., 309 U.S. 414, 84 L.Ed. 840, 60 S.Ct. 664 (1940). No state-owned property was involved in McGoldrick v. Gulf Oil, and the court may have been able to invalidate the tax on the ground that it was not sufficiently related to the benefits and protections conferred by the state (see Clark, supra, at pp. 72-73).

Assume for a moment that the McGoldrick v. Gulf tax were a property tax on the goods which helped pay for fire and police protection rendered by the locality regardless of its customs status (note that Customs although theoretically "controlling" bonded goods does not protect them from fire or theft). McGoldrick logic clearly obliges local taxpayers, including competing oil companies dealing with domestic fuel, to pay for the privilege of protecting the foreign goods.

National pruposes, including the subsidizing of foreign enterprises or goods, are purposes of the nation as a whole and logically should not be funded by a restricted base of taxpayers. Congress, for instance, may deem it advisable to grant benefits to foreign companies doing business principally on the East Coast in order to obtain favorable treatment abroad for West Coast United States companies. Assuming that such a subsidy passes constitutional muster, it would be inappropriate to "fund" the East Coast subsidy by means of a reduction in eastern states' taxes on the foreign companies. The Western taxpayer receives the benefit of having U.S. companies located near him subsidized abroad, and may be affected by those companies' improved prospects. But it is the Eastern taxpayer who will be forced to support local and state services to the foreign company

without benefit to himself. He may have to support it by higher taxes or by accepting a lower level of governmental service overall. In short, Congressional subsidies of foreign enterprizes should be done with national resources, not local.

McGoldrick goes even further. If we assume, as do some state cases (see Int'l Shoe Co. v. Cocreham, 246 La. 244, 164 So.2d 314, cert. den. 379 U.S. 902 (1964); State ex rel. Ciba Pharmaceutical Prods. v. State Tax Comm., 382 S.W.2d 645 (Mo. 1964); and Smith, Kline & French Labs. v. State Tax Comm., 241 Ore. 50, 403 P.2d 375 (1965)), that the federal government can regulate commerce by prohibiting state action not amounting to regulations, we assume that there is simply no power reserved to the states. Adequacy of a locality's fire protection most assuredly affects interstate commerce, but can the federal government oblige the Pasadena Fire Department to give more protection to interstate shipped goods than it gives to goods produced in-state? The logic of McGoldrick, and the appellants would answer this question in the affirmative.

We have come full circle. Alexander Hamilton (no rabid supporter of states' rights by any means) said that the States,

> ". . . possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . . And . . . an attempt on the part of the National Government to abridge them in the exercise of its would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Federalist Papers No. 32) (Emphasis added).

Now, Justice Jackson can say by way of concurring opinion,

> "Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the state. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether." (Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 88 L.Ed. 1283, 64 S.Ct. 950 (1944).)

We have traced this development of this change in attitude. The new one of total federal sovereignty has been made in complete ignorance of the proper view of the states' ability to tax. It has come about in reaction, not only to the

increasing speed and complexity of commerce, but also in response to new kinds of taxes.

Controls are indeed required to insure that those taxes remain neutral and non-discriminatory. But those tools are available without recourse to a wholesale revision of the federal-state relationship.

V
THE APPROPRIATE CONTROLS ON THE STATES' POWER TO TAX

As this Court has reviewed an increasing number of state income and sales taxes which affect interstate commerce, it has developed an increasingly closer scrutiny of those taxes on constitutional grounds. One of the latest of these analyses appears in Complete Auto Transit v. Brady, supra. The factors used there appear to this amicus curiae to narrow the impact of state taxes on interstate enterprises to the point where they are neutral, not favoring intra-state commerce over inter-state, and discouraging excessive taxes generally. It is this logic which provides the basis for protecting this and all inter-state taxpayers from discriminatory or regulatory taxes.

a. Nexus. The activity of the taxpayer in the taxing jurisdiction must be sufficient to justify some tax.

b. Relationship to Benefits. Interrelated with the nexus test is the requirement that the tax bear some reasonable relationship to the benefits conferred. It may well be that two separate kinds of tax based on the same benefit would violate this principal (for instance, if in Complete Auto Transit, Inc. v. Brady, supra, the tax payer had alleged that the state was also imposing a "franchise tax" which had no other basis than the fact that the company was doing business in the state). This test would also exclude the tax which is so excessive that it becomes prohibitory, even if it is non-discriminatory (for an interesting view of excessive taxation see Parkinson, The Law and Profits).

c. Discriminatory. The tax must not discriminate against interstate commerce. A tax which discriminates in favor of certain parts of interstate commerce may also be subject to this test, since discrimination either for or against, is regulation, and Congress' extensive rate-tax-safety controls, in the area of national business, might be thwarted even by favortism on the part of a state. (The national government may believe, for instance, that the business being favored should receive equal treatment with other businesses.)

d. Fair Apportionment. This requirement can be viewed as part of the relationship to benefits test, since the benefits and protections conferred by the taxing jurisdiction can only be conferred on that portion of the business having a "presence" in the jurisdiction. A tax which goes beyond that presence (however measured) exceeds both the nexus and relationship requirements as well as being unfairly apportioned.

Thus, it can be seen that the interstate and foreign taxpayers are protected from unilateral regulation by a state tax. Such regulation (assuming that Congress has pre-empted the field of interstate business tax encouragement and regulation), whether it be favoring the interstate taxpayer or burdening it, must be approved by Congress. For it is the federal government which can, by the means at its disposal, encourage or burden various types of business.

The tariff rates classicly demonstrate Congress' full authority to regulate foreign commerce. Any individual state's effort to increase the burden on an importer vis-a-vis the interstate dealer, or to decrease that burden would tip the delicate balance established so completely by Congress.

But the interstate rates-regulations and tax benefits are equally pre-emptive of state regulation unless agreed to by Congress. For instance, the oil depletion allowance, an effort to encourage oil exploitation, would be thwarted if state governments imposed additional taxes on oil companies. In like manner a state exemption in favor of such oil companies would thwart the purpose of Congress in repealing that allowance.

The taxpayer is protected from regulatory state taxes.

It is also protected from regulatory procedures. Logically, the same requirements for uniformity of taxes should apply to the procedures for their levy and collection. Thus, any procedures which violate the standards of Complete Auto Transit would also be regulatory and would constitute state

regulations of interstate or foreign commerce without Congressional approval. But it is not ordinarily undue discrimination to tax different classes of owners of different kinds of property by different methods and by means of different sets of officers. Salt Lake City v. Utah Copper Co., 294 F. 199, cert. den. 264 U.S. 590, 68 L.Ed. 864, 44 S.Ct. 403 (1924) and writ of error dismissed 267 U.S. 610, 69 L.Ed. 813, 45 S.Ct. 461 (1925).

CONGRESSIONAL AUTHORITY - CONCLUSION

There is little doubt that the requirement for neutrality of state taxation goes beyond the usual case language conferring on state legislatures broad authority to classify taxpayers, although there is little support for the present state activity in the field of regulating commerce. But Congress' activity in the field of commerce and tax encouragements has become so complete that the states' regulatory tax powers over commerce must give way. Only then will foreign and interstate commerce be brought to the point where all businesses doing business in a state will be doing so knowing that it is the federal government they must look to for encouragement in their efforts. Their cost of doing business in that state will, then, be like any other business. The business will be paying its "fair share" of state costs (see Business Taxes in State and Local Governments, 1972, Lexington Books p. 1, "Opening Comments" by Lewis C. Bell), and will not be obliged to bear another's. The federal government's authority

over regulation will be as complete as it ought to be. But at the same time the states will be assured, as they were in 1789, that they will be able to maintain fire and police protection, keep up their schools, help their poor and sick, all without the threat that someday, somehow, the federal government will order them to cease functioning.

Before the advent of federal economic incentives in the area of taxation, state regulation of commerce by tax incentives would be unthinkable. (For a declaration of the economic responsibility at the federal level, see Gilbert, "Toward Full Employment" Fortune Magazine, October 1945.) State donations to business were declared not to constitute public policy (Citizens Savings & Loan Assoc. v. Topeka City, 87 U.S. (20 Wall.) 665, 22 L.Ed. 455 (1875).

Now government encouragement to industry has become accepted, but the conflict between the federal and state levels of that activity have become so confusing that the businesses meant to be aided are subject to incentives at one level of government while being burdened at the other.

Even-handed, simplified taxation is no longer possible by carrying on the assumption that states can encourage or discourage businesses by means of tax incentives while the federal government is trying to do the same thing. That even-handed treatment is required in today's fast paced world. It requires that we look toward the federal system as an opportunity to resolve local problems at the local level, while assuring all of those who support those efforts financially that they are not paying more than their fair share.

At the same time, the states are entitled as a matter of right to collect the revenue necessary for them to function, as long as that revenue collection does not regulate commerce.

VI
APPORTIONED TAXES - INTRODUCTION

The comments of the appellants on the issue of apportioning taxes in accordance with business activity in the state reflects the concern of business and government alike that the states maintain a neutral stand regarding all taxpayers. Those comments also reflect the need to fairly apportion taxes in the context of changes in business organizations. But it must be remembered that the Commission's existence has little to do with the concept which was approved by this court in 1891 (see Clark, supra, at pp. 53, et seq., concerning the development of the apportionment concept).

APPORTIONING STATE TAXES HAS NOTHING TO DO WITH THE COMMISSION ITSELF

The appellants have ascribed the problems involved with apportioning state taxes directly to the existence of the Commission. The short answer to these contentions (Appellants' Opening Brief, pp. 35-47) is that the testing of the apportionment concept should be conducted in the context of actual taxation. The existence of the Commission, or lack thereof, will not make the apportionment concept disappear, and the apportioning of state and local taxes based upon the activity of businesses within the state does not provide any rationale for either reducing or obliterating its powers.

The doctrine of absention encourages the states to solve their tax disputes. California's methods for resolving those disputes have been declared to be adquate to bring that doctrine into play. (Mandel v. Hutchinson, 494 F.2d 364 (1974).)

The appellants' contentions regarding the apportionment concept are appropriately introduced in the courts when the apportioned taxes are imposed by the states, as they have been in the past.

IN ANY CASE, THE APPORTIONMENT OF STATE AND LOCAL TAXES HAS BEEN APPROVED BY THE COURTS

The concept of apportioning taxes in accordance with a business' activities in a state is not new. In 1891 property taxes were apportioned on the basis of the business' activity within the state. (Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 35 L.Ed. 613, 11 S.Ct. 876 (1891). That apportionment principle was approved by various cases over the years (Branniff Airways v. Nebraska, 347 U.S. 590, 98 L.Ed. 967, 74 S.Ct. 757 (1954); Ott v. Mississippi Barge Lines, 336 U.S. 169, 93 L.Ed. 585, 69 S.Ct. 432 (1949); Flying Tiger Lines v. County of Los Angeles, 51 Cal.2d 314, 333 P.2d 323 (1958) and Japan Lines Ltd. v. County of Los Angeles, 61 Cal.App.3d 562, 132 Cal.Rptr. 531 (1976) [this decision accepted for hearing by the California Supreme Court]); Standard Oil Co. v. Peck, 342 U.S. 382, 96 L.Ed. 427, 72 S.Ct. 309 (1952).

APPORTIONMENT OF STATE AND LOCAL TAXES IS APPROPRIATE IN THE CONTEXT OF BOTH INTERSTATE AND INTERNATIONAL COMMERCE

The appellants suggest that it has been traditional to impose taxes on a business only at its formal place of domicile. It is true that, when business was primiarlly local in character, taxing an organization only where it was incorporated was factually related to the services provided by the taxing state. The businesses performing their activity primarily in the jurisdiction of domicile, thus used to reimburse the very government giving that business its benefits and protections. The cost of the goods sold by that business would, then, reflect the cost of providing those benefits and protections and would be in accordance with the guidelines of Complete Auto Transit v. Brady, supra.

But as businesses have become larger and have crossed both state and national lines, this situation changed. This Court recognized that the most dynamic and expanding industries of the last century, the railroad companies, were receiving services from jurisdictions other than their technical domicile. The railroads' keeping their movable property in the other jurisdictions created the strain on the other jurisdictions' governmental support. The ability of those other jurisdictions to attempt to recoup that cost was affirmed early (Pullman's Palace Car Co. v. Pennsylvania, supra).

But it was not until Standard Oil Co. v. Peck, supra, that the apportionment concept was applied to prohibit the jurisdiction of technical domicile from taxing property on a basis not reflecting that property's activity in the jurisdiction. (That case would also be supported by the guidelines of Complete Auto Transit v. Brady, supra.)

There must be little doubt that during the period between Pullman's Palace Car Co. v. Pennsylvania, supra, and Standard Oil Co. v. Peck, supra, some states were, by imposing taxes not related to the level of activity in the jurisdiction, actually creating multiple taxation.

The appellants contend that apportioning state taxes will cause multiple taxation. It is probable that any development of state and/or local taxation will create this difficulty, and the courts must resolve these difficulties as soon as practical. But the desirability of adopting our taxes to changing circumstances remains.

The international commerce situation provides additional ad hoc complications to which the appellants point. They rely on these complications, first, for the proposition that no apportionment of state taxes should take place, and, second, that the Commission should be disbanded because it supports the apportionment concept.

Although the international difficulties do not support the appellants' conclusions, as previously pointed out, it is appropriate to deal with those problems, because state taxation, like state or local treatment of aliens general, does impact

upon international affairs. The appellants would suggest that because change in the taxation of foreign businesses will cause their governments to complain, that change must not be undertaken. But it has been accepted by both our federal government and other countries that the states do exert an independent sphere of action with which the federal government may not interfere. The federal government has both the authority and the duty to take appropriate steps to maintain a consistent foreign policy including reimbursing aliens for treatment which was not compensated for under state law.

We have seen that the states possess the authority to tax as long as that taxation is not regulatory (being non-prohibitory, non-discriminatory and related to the governmental services rendered). When the states impose any such tax uniformly on all businesses which are conducting activity within its borders, they will probably impose it on some foreign interests. It is possible that some such tax will not dovetail with the taxes imposed upon the foreign business by its own country or by another foreign country. Taxes on our country's businesses may run this same risk (see Sea-Land Services, Inc. v. County of Alameda, 12 Cal. 3d 772, 117 Cal. Rptr. 448, 528 P. 2d 56 (1974)).

But to suggest that a state tax must follow some pattern based more on tradition than upon the fact of benefits and protections conferred gives up a state's ability to obtain reimbursement for the governmental services it renders.

The taxation of an interstate or international business only where it is domiciled, as the appellants

appear to suggest, would lead to escapes from taxation since the domicile state could impose taxes related to the benefits it confers and all other states would be obliged to collect no tax.

How do state and local taxes fit into the federal system and international affairs? From what has been said above, it is clear that the states may not treat foreign businesses any better or worse than interstate businesses. The states have the duty not to regulate foreign commerce (Hines v. Davidowitz, 312 U.S. 52, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). (It is this Amicus Curiae's position that the states may not regulate interstate commerce without Congressional approval because of the many rates, tax, and safety laws affecting virtually every phase of interstate commerce, including the amount of profit.) But to say that states may not impose a tax which is legitimate under this country's laws is to say that states may not obtain reimbursement for services they render only because those services are rendered to foreign enterprises. Such subsidies of business activity would do more to cause confusion in international relations than any of the problems posed by appellants. The cost of doing business in California should be the same with respect to the amount of in-state activity (whether measured by property, sales, employees or whatever) for intra-state businesses as for interstate or foreign businesses. The appellants propose that the measure be different for businesses operating from outside the state.

A government's ability to tax depends, in the long run, upon its evidencing good faith and reasonability. Insofar as government creates

"special" distinctions for "special" people, it does less than its best, and the states and localities should not distinguish between taxpayers on the basis of the geographic location of the taxpayer's domicile. (WHYY v. Glassboro, 343 U.S. 117, 21 L. Ed. 2d 242, 89 S. Ct. 286 (1968).) Our treatment of foreign enterprises by the states and localities must be the same as the treatment we provide our own nationals. This concept is supported by the legal analysis above as well as by the treaties to which this country is a party (see Supplementary Convention between U. S. A. and the Kingdom of Sweden Relating to Income and Other Taxes, 15 U.S.T. 1824, T.I.A.S. 5656, Act II (c)(7).

APPORTIONMENT OF "NON-BUSINESS" TAXES IS APPROPRIATE

One of the features of the apportionment of taxes to which appellants object is the taxation of rents and other "non-business" income at the location of the income producing property. Surely, the "traditional rule" for allocating the taxes on this income provides cogent reasons for apportionment. To say that Delaware should receive the benefits of taxing rent income from property located in California would seem to run contrary to the guidelines provided by Complete Auto Transit v. Brady, supra, as a tax not related at all to the benefits and protections provided by Delaware.

APPORTIONMENT - CONCLUSION

Thus, the impact of appellants' apportionment arguments leads one to conclude that apportionment is proper especially in the context of international businesses whose domicile gives no more benefits to that business than does a state domicile of an active multi-state business. The governments ought to receive a return for the business activity within their jurisdictions and apportionment is the means by which that may be accomplished, as long as the Complete Auto Transit tests are satified.

VII

STATE AND LOCAL TAXES, AND DISCRIMINATION

The appellants' contentions which are logically related to the actual activities of the Commission are primarily dealt with at appellants' opening brief, pp. 48-51. The important aspect of this portion of the appellants' brief is that it consists of suggestions made by the Commission. No matter how onerous, discriminating, or abusive an organization's suggestions may be, it would seem that some action be actually instituted before the 14th Amendment can be brought into play. The appellants have concluded only that the letters from which they quote show that the Commission may discriminate, assumedly at some time in the future.

There is indeed a problem of discrimination in the area of state and local taxation. But the ultimate conclusion must be that states do not the authority to differentiate between intrastate, interstate, and international commerce.

They have, and ought to have, the authority to impose levies, which are non-regulatory, non-discriminatory, and non-prohibitory, on any business, and suggestions by the commission, or the equally vocal business lobby do not constitute state action.

CONCLUSION

Subject to any 5th Amendment limitations which may apply, Congress has the authority to grant foreign businesses subsidies and exemptions in return for favorable treatment for United States businesses abroad. It does not have the authority to exempt such a business, or all business, from state taxation, as long as that state taxation does not regulate. But the states' taxation must be uniform.

As long as the states' taxes are uniform and appropriately related to the benefits conferred and to the activity of the taxpayer within the state, those taxes represent nothing more than a cost of doing business in the taxing jurisdiction. The goods sold by such businesses should reflect the benefits conferred, and subsidies are regulations of commerce which are not within the power of the states, but of national concern.

Thus, the appellants' claim that the compact takes away Congress' power is not borne out under

its commerce clause rationale. As long as the states do not regulate in their taxing policies, they not only avoid treading on Congress' powers, they create an atmosphere of certainty, uniformtiy, and fairness which must be the hallmark of government founded on the God-given right of its citizens to participate in its affairs.

Respectfully submitted,

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